Supreme Court, U.S.
FILED
APR 29 2004
OFFICE OF THE CLERK

(3)

No. 03-1165

IN THE

Supreme Court of the United States

NEBRASKA CATTLEMEN, INC., *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

LORANE F. HEBERT*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

*Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF AUTHORITIES

Page

CASES:

Alaska Airlines, Inc. v. *Brock*, 480 U.S. 678 (1987).... 9

Board of Regents of Univ. of the Wis. Sys. v. *Southworth*, 529 U.S. 217 (2000)..... 5, 8

Burns v. *United States*, 501 U.S. 129 (1991)..... 9

Califano v. *Yamasaki*, 442 U.S. 682 (1979)..... 9

Central Hudson Gas & Elec. Corp. v. *Public Serv. Comm'n*, 447 U.S. 557 (1980)..... 2, 3, 4, 8

Charter v. *USDA*, 230 F. Supp. 2d 1121 (D. Mont. 2002)..... 6

Cochran v. *Veneman*, 359 F.3d 263 (3d Cir. 2004).... *passim*

Glickman v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997)..... 6, 9

International Ass'n of Machinists v. *Street*, 367 U.S. 740 (1961)..... 9

Keller v. *State Bar of California*, 496 U.S. 1 (1990)... 7

Lebron v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995)..... 7

Michigan Pork Producers Ass'n, Inc. v. *Veneman*, 348 F.3d 157 (6th Cir. 2003), *petition for cert. filed* (Jan. 20, 2004) (No. 03-1043)..... 3, 4

Pelts & Skins, LLC v. *Landreneau*, 2004 WL 725275 (5th Cir. 2004)..... *passim*

Rosenberger v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995)..... 5

Smith v. *Allwright*, 321 U.S. 649 (1944)..... 7

TABLE OF AUTHORITIES—Continued

Page

United States v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990) 8

United States v. *Gainey*, 380 U.S. 63 (1965) 2

United States v. *United Foods, Inc.*, 533 U.S. 405 (2001) 2, 3, 4, 8

West Virginia State Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943) 5

Wooley v. *Maynard*, 430 U.S. 705 (1977) 5

CONSTITUTION:

U.S. Const. 1st amend 4, 7, 8

STATUTES:

7 U.S.C. § 2901(a)(1) 6

7 U.S.C. § 2901(b) 2, 6, 10

7 U.S.C. § 2904(4)(B) 10

7 U.S.C. § 7401(b)(2) 5, 8

RULE:

S. Ct. Rule 10 2

IN THE

Supreme Court of the United States

No. 03-1165

NEBRASKA CATTLEMEN, INC., *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

Respondents do not even attempt to deny that this case involves a recurring issue of national importance. Of course, it is difficult to deny the significance of a case when the Solicitor General, thirty States plus Puerto Rico, and some forty-eight industry amici have all urged this Court to grant review.[1] The Eighth Circuit has declared "unconstitutional and unenforceable" an Act of Congress. Pet. App. 28a. That alone makes this an important case, but there is more—much

[1] *See* Brief of Texas, *et al.* as *Amicus Curiae* in Support of Petitioners; Brief of 48 Cattle and Agricultural Associations as *Amicus Curiae* in Support of Petitioners.

more. In striking down the Beef Act in its entirety, the Eighth Circuit invalidated an important government program that Congress expressly determined was "in the public interest," 7 U.S.C. § 2901(b), and that, at a time of increased public concern over food safety, is more vital than ever. At the same time, the Eighth Circuit cast doubt on the constitutionality of scores of similar federal and state programs. The Eighth Circuit's decision, moreover, is contrary to numerous of this Court's precedents, and directly conflicts with the decision of another federal circuit involving the same Act of Congress. There is no question that this case meets *all* of this Court's customary criteria for certiorari. *See* S. Ct. Rule 10.

1. Respondents acknowledge, as they must, the gravity of invalidating an Act of Congress. *See* Opp. 2. Attempting to dismiss concerns in this case, respondents contend that the Eighth Circuit's decision "was pre-ordained by *United Foods*," and chide petitioners for "refus[ing] to accept * * * this Court's decision in that case." *Id.* In fact, it is respondents who refuse to accept that *United Foods* expressly left open the government speech and *Central Hudson* issues presented here. *See United States* v. *United Foods, Inc.*, 533 U.S. 405, 408, 416-417 (2001); *see also Pelts & Skins, LLC* v. *Landreneau*, 2004 WL 725275, at *4 n.12 (5th Cir. 2004) ("In *United Foods*, the Court intimated that the government speech doctrine might have been applicable * * * but expressly reserved this question because the argument was not raised or addressed in the court of appeals."); *Cochran* v. *Veneman*, 359 F.3d 263, 277 (3d Cir. 2004) ("the Court has left open the question whether *Central Hudson*[] * * * applies to cases involving compelled commercial speech") (emphasis omitted). Despite respondents' repeated efforts to demonstrate that the Eighth Circuit merely "applied [a] controlling decision," Opp. 12, *United Foods* is not dispositive here. The Eighth Circuit's "exercise of the grave power of annulling an Act of Congress" fully merits this Court's review. *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).

2. Respondents note that, since the Eighth Circuit issued its decision in this case, two other circuit courts have declared unconstitutional similar federal statutes and another has invalidated a similar state program. Opp. 14-15. But the fact that two additional Acts of Congress and a state statute have been struck down should give this Court pause, not comfort. This Court's decision in *United Foods* has already resulted in a wave of litigation challenging various state and federal agricultural commodity promotion and research programs. *See* Pet. 25-26; Brief of Texas, *et al.* 17 & n.20. Until this Court resolves the issues left open by *United Foods*, such litigation will continue to proliferate.

Moreover, the decisions issued by the lower courts thus far demonstrate that this Court's guidance is sorely needed. Even among circuit courts, the standards applied have varied widely. The Eighth Circuit held that, as a categorical matter, the government speech doctrine does not even apply in this case because it involves the compelled funding of speech. *See* Pet. App. 15a-19a. The Third, Fifth, and Sixth Circuits, by contrast, declined to follow the Eighth Circuit's approach and instead considered whether the generic advertising at issue was government speech. *See Cochran*, 359 F.3d at 273-274; *Pelts & Skins*, 2004 WL 725275, at *4-*6; *Michigan Pork Producers Ass'n, Inc.* v. *Veneman*, 348 F.3d 157, 161-162 (2003). Indeed, the Fifth Circuit expressly disagreed with the Eighth Circuit's conclusion that "the government speech doctrine [is] categorically inapplicable to compelled subsidy cases," reasoning that this Court's "treatment of compelled subsidy challenges convinces us that the government speech doctrine is at least potentially applicable to this general category of cases." 2004 WL 725275, at *4 n.13.

The Eighth Circuit also concluded that, "had the government relied upon *Central Hudson* in *United Foods*, the Supreme Court would have adapted the *Central Hudson* test to the circumstances of that case." Pet. App. 21a. The Sixth

Circuit, meanwhile, found *Central Hudson* clearly "inapplicable" to cases involving the compelled funding of speech. 348 F.3d at 163. The Fifth Circuit, observing that "other circuits have diverged on this question," stated that it "doubt[ed]" that *Central Hudson* applies in this context. 2004 WL 725275, at *8 n.21. The Third Circuit purported to determine whether *Central Hudson* applies, but in the end simply chose to pass on the matter—citing this Court's apparent "reluctance" to "enter the controversy over the applicable scrutiny for compelled commercial speech cases." 359 F.3d at 276-279. Such confusion and disuniformity will persist until this Court resolves the government speech and *Central Hudson* issues left open in *United Foods*. This case provides a timely and ideal vehicle for this Court to resolve those issues, end the confusion, and stem the tide of litigation that threatens to flood the lower courts.

3.a. The Eighth Circuit's decision is contrary to this Court's precedents on the government speech doctrine. *See* Pet. 14-20. In their brief in opposition, respondents betray as much confusion over the doctrine as the Eighth Circuit itself. Respondents contend, for example, that "[e]ven if one characterized generic beef promotion under the Beef Act as government speech, it still would not be immune from the First Amendment." Opp. 23. In their view, the Eighth Circuit "properly observed [that] '[t]he two categories of First Amendment cases—government speech cases and compelled speech cases—are fundamentally different.' " *Id.* (quoting Pet. App. 17a) (second alteration in original). That conclusion finds *no* support in this Court's precedents, *see* Pet. 15-19, and not one of the other circuit courts to address the government speech issue in this context has endorsed it. *See, e.g.*, *Pelts & Skins*, 2004 WL 725275, at *4 n.13 ("the government speech doctrine is at least potentially applicable to this general category of cases"). Thus, if the speech under the Beef Act is government speech—and it plainly is—then it is immune from First Amendment challenge.

Respondents also contend that individuals cannot be "unconstitutionally" compelled to support speech with which they disagree, regardless of "who is technically 'speaking.' " Opp. 13. That assumes, however, that individuals are being "unconstitutionally" compelled to support speech in the first place. As this Court has made clear, the government may spend "funds raised * * * for speech and other expression to advocate and defend its own policies." *Board of Regents of the Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 229 (2000); *see also Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("when the government appropriates *public funds* to promote a particular policy of its own it is entitled to say what it wishes") (emphasis added). Thus, the government is plainly entitled to compel funding for its own speech, whether or not citizens agree with its message. Accordingly, whether the government is speaking is not a "formalistic or semantic debate," Opp. 13, but a question of constitutional significance.

Respondents further rely on *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943). *See* Opp. 23-24. As explained, however, those cases are a far cry from this one, involving the compelled funding of a government program by those who, in Congress's judgment, "most directly reap the benefits of the program[]." 7 U.S.C. § 7401(b)(2). *See* Pet. 19. The Beef Act simply requires respondents to pay an assessment; it neither "compel[s] [them] to utter what is not in [their] mind[s]," *Barnette*, 319 U.S. at 634, nor makes them "the courier for [the government's] message." *Wooley*, 430 U.S. at 717. That is, no one has asked respondents to express *their* support of beef promotion, as in *Barnette*, or to bear such a message on *their* property, as in *Wooley*. Respondents simply ignore the fact that this Court has already held that *Barnette* and *Wooley* and *all* the Court's "compelled speech case law [are] *clearly inapplicable*" to cases, like this, involving the compelled funding of a generic advertising

program. *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 470-471 (1997) (emphasis added).

b. Respondents contend that the Eighth Circuit "was plainly correct" in concluding that the expressive activities conducted under the Beef Act "are not fairly characterized as government speech." Opp. 19. Respondents' brief contains no citation to the court's opinion, and there is none. As noted, the Eighth Circuit in fact never decided whether the generic advertising under the Beef Act is government speech, concluding instead that the government speech doctrine is categorically inapplicable to cases involving the compelled funding of speech. *See* Pet. App. 15a-19a; *Pelts & Skins*, 2004 WL 725275, at *4 n.13 ("The Eighth Circuit declared the government speech doctrine categorically inapplicable to compelled subsidy cases.").

In any event, the generic advertising conducted under the Beef Act is government speech. The general content of the speech—that beef is "a valuable part of human diet"—and the purpose of the speech—"to maintain and expand domestic and foreign markets and uses for beef"—are prescribed in the first instance by Congress. 7 U.S.C. §§ 2901(a)(1), (b). The specific messages are formulated and communicated under the direct supervision and control of the Secretary of Agriculture by special administrative bodies created by Congress for the express purpose of furthering important governmental objectives. As the record in this case reflects, the Secretary actively participates in the formulation of the specific messages, and must give final approval to *every* message disseminated under the Beef Act. *See* 8th Cir. J.A. 453, 455-456, 460, 542, 545; Tr. 192, 198, 202, 215, 270, 305-308, 312-313, 359, 370, 384-385, 388. As the court concluded in *Charter* v. *USDA*, 230 F. Supp. 2d 1121, 1138 (D. Mont. 2002), "[b]y no means is the government's control over the checkoff-funded program *pro forma*." Thus, what is plainly at issue here is government promotion of its *own* message, not government regulation of the speech of *others*.

In attempting to demonstrate otherwise, respondents rely on *Keller* v. *State Bar of California*, 496 U.S. 1 (1990). As we have explained, the Eighth Circuit's conclusion that government speech and compelled funding of speech cases "are fundamentally different," Pet. App. 17a, cannot be reconciled with this Court's decision in *Keller*, which specifically applied the government speech doctrine in the compelled funding context. *See* Pet. 17. Contrary to respondents' contention (Opp. 17), *Keller* is not controlling here. In *Keller*, the Court concluded that the State Bar was not like a typical government agency, which "[is] expected as a part of the democratic process to represent and to espouse the views of the majority of [its] constituents." 496 U.S. at 12-13. That is quite unlike the case here, where the entities conveying the message to which respondents object—the Beef Board and the Operating Committee—were expressly created by Congress to further important government objectives through the formulation and communication of messages prescribed in the first instance by Congress "as a part of the democratic process" under the direct supervision and control of a politically accountable official, the Secretary of Agriculture. 496 U.S. at 12.[2]

Respondents acknowledge that "the government can obviously speak for itself * * * or even retain others for the purpose of communicating its messages," but contend that the government "may not selectively compel private individuals or groups to fund, subscribe to, or advance" govern-

---

[2] As the Federal petitioners have explained (Pet. 16-17), under this Court's decision in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), the Board and Operating Committee are government entities for First Amendment purposes. Respondents fail to offer a persuasive reason why *Lebron*'s consideration of whether an entity "is part of the Government," 513 U.S. at 400, should be regarded as "a restricted railroad ticket, good for this day and train only." *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). *See* Opp. 20-21.

ment speech. Opp. 23. *See id.* at 24 ("government speech" is "financed by general revenues"). As this Court has recognized, however, "[t]he government, as a general rule, may support valid programs and policies by taxes *or other exactions* binding on protesting parties." *Southworth*, 529 U.S. at 229 (emphasis added). Accordingly, Congress's decision in this instance to impose what is akin to a modest user fee on those "who most directly reap the benefits of the program[]," 7 U.S.C. § 7401(b)(2), and who as a group have voted to fund the program, does not change the character of the speech here from government to private speech.

4. Respondents fail to dispel the conflict between the decision below and the Third Circuit's decision in *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). *See* Pet. 22-24. In *Cochran*, *supra*—which did *not* involve the Beef Act—the Third Circuit did not overrule *Frame*. Rather, the court concluded—erroneously—that *United Foods* had "abrogated" *Frame*. 359 F.3d at 274. In *Frame*, the Third Circuit held that the Beef Act survives scrutiny under the *Central Hudson* test for commercial speech—indeed, the court held that the Act survives scrutiny under an even *stricter* First Amendment standard. *See* 885 F.2d at 1134 n.12; *see also id.* at 1133-37. As the *Cochran* court itself observed, *United Foods* "left open whether *Central Hudson*[] * * * applies to cases involving compelled commercial speech." 359 F.3d at 277. *See also Pelts & Skins*, 2004 WL 725275, at *8 n.21 ("*United Foods* did not explain if or how the *Central Hudson* test applies to compelled subsidy cases"). Thus, *United Foods* did not somehow eviscerate *Frame*'s holding that the Beef Act survives scrutiny under *Central Hudson*. In concluding otherwise, the *Cochran* court improperly concluded that *United Foods* was ultimately dispositive of the *Central Hudson* analysis, just like the Eighth Circuit. *See* 359 F.3d at

279; Pet. App. 26a-28a. *Cochran* thus underscores, not diminishes, the need for this Court's review.[3]

5. In contending that the Eighth Circuit's invalidation of the *entire* Beef Act is "completely unworthy" of review, Opp. 27, respondents wholly ignore the conflicts with this Court's decisions. This Court has held that "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). By (1) enjoining the collection of *any* assessments under the Act, even to fund research and education activities that respondents did *not* challenge, and (2) upholding a nationwide injunction that improperly allows cattle producers who support the checkoff to be "silenced by the dissenters," *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 773 (1961), the Eighth Circuit went far beyond what was necessary "to provide complete relief to the plaintiffs."

The Eighth Circuit also violated the well-established principle that "[a] court should refrain from invalidating more of [a] statute than is necessary." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (quotations and alterations omitted). *See* Pet. 20-22. In attempting to demonstrate otherwise, respondents contend that Congress "expressly" deleted a preexisting severability clause when it overhauled the Beef Act in 1985. Like the Eighth Circuit, however, respondents fail to cite *anything* suggesting that the omission of a severability clause in the 1985 Act was deliberate. *See* Pet. 21 n.7. The current Act is merely silent with respect to severability, and "not every silence is pregnant." *Burns* v. *United States*, 501 U.S. 129, 136 (1991) (quotation and alteration omitted).

---

[3] Respondents erroneously assert that petitioners "have abandoned their claim" that the Beef Act is constitutional under *Wileman*. Opp. 25. As petitioners specifically noted, "[t]he Court's decision in *Wileman* * * * provides another basis for upholding the Beef Act." Pet. 23 n.8.

Respondents also contend that it is "inconceivable" that Congress intended the Act's research and education provisions to be severable in the event its promotion provisions were stricken. Opp. 29.[4] But Congress specifically enacted a "Beef Promotion *and* Research Act," the express purpose of which is to further important governmental objectives through "promotion *and* research," 7 U.S.C. § 2901(b) (emphasis added), and which specifically provides for the development of plans or projects of "research, consumer information, and industry information." *Id.* § 2904(4)(B). To conclude that the Act's research and education provisions are not severable would be to conclude that Congress did not consider those activities vitally important. The Act itself confirms that Congress did.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted, and the judgment reversed.

Respectfully submitted,

LORANE F. HEBERT*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

* Counsel of Record

Counsel for Petitioners

---

[4] Respondents erroneously assert that 85 to 90 percent of checkoff revenues are spent on generic beef promotion. *See* Opp. 28. The record in this case shows that the actual figure is less than 60 percent. *See* Tr. 280-281; *see also* Decl. of Monte Reese in Support of Defs.' Mot. for a Stay Pending Appeal at 3 (Add. E) (citing J.A. 638) ("[i]n the past fiscal year, 58.3% of the Beef Board's expenses were for the Board's promotion programs").